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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 423

ARTHUR McALEENAN, HENRY J. McALEENAN, H. ALVIN McALEENAN, ET AL.,
Petitioners,

vs.

GEORGE D. HORNING, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN PAUL JONES,
Counsel for Petitioners,

JAMES V. CONNELLY,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

ARTHUR McALEENAN, HENRY J. McALEENAN, H. ALVIN McALEENAN, ALVINA V. McALEENAN, KATHERINE McALEENAN FAGAN, MARGERY McALEENAN O'SULLIVAN, KENNETH K. McALEENAN AND THERESA R. HAGGERTY, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF "McALEENANS,"
Petitioners,

vs.

GEORGE D. HORNING, INCORPORATED, A CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioners, Arthur McAleenan, Henry J. McAleenan, H. Alvin McAleenan, Alvina V. McAleenan, Katherine McAleenan Fagan, Margery McAleenan O'Sullivan, Kenneth K. McAleenan and Theresa R. Haggerty, co-partners, do ing business under the firm name and style of "McAleenans," respectfully petition this honorable court to grant a writ of certiorari to review the opinion and judgment of

the United States Circuit Court of Appeals for the Fourth Circuit decided and filed on May 12, 1945 (R. 116), in this case lately pending in said Circuit Court of Appeals, entitled "George D. Horning, Incorporated, a corporation, defendant appellant, v. Arthur McAleenan, et al., etc., Copartners Doing Business Under the Firm Name and Style of 'McAleenans,' plaintiff appellee," being cause No. 5343 on the docket of said Circuit Court of Appeals, reversing a judgment of the District Court of the United States for the Eastern District of Virginia (Alexandria Division), in said cause, in favor of your petitioners against the respondent herein.

Statement of the Matter Involved

The action was brought in the District Court by the petitioners, as plaintiffs, against the respondent, as defendant, to recover the sum of $17,000.00 loaned by the plaintiffs on July 8, 1941.*

The complaint contained nine causes of action, five of which (Nos. 1, 2, 3, 4 and 7) sounded in tort, and were, basically, actions against the defendant for fraud and deceit. To these five causes of action the defendant plead either the statute of limitations or the statute of frauds.

The remaining four causes of action sounded in contract and were as follows:

5. For money borrowed jointly by the defendant and one Mrs. Margaret Boyle.

6. For money lent to the defendant.

8. For money paid to the defendant.

9. For money, property of the plaintiffs, had and received by the defendant.

---

* The petitioners will hereafter be referred to as the "plaintiffs," and the respondent as the "defendant."

In order to dispose of the questions of law raised by the pleas of the statute of limitations and the statute of frauds, and reach an early trial, the plaintiffs and the defendant entered into a stipulation, dated May 25, 1944, whereby the plaintiffs, with the express consent of the defendant, withdrew causes of action Nos. 1, 2 and 4.

The cause proceeded to trial before a jury on June 15, 1944, and required two days to try.

At the close of plaintiffs' case, defendant moved to strike out "all of the testimony of Mr. McAleenan and all the other witnesses, Blauweiss and Kelly, with reference to an alleged custom in the trade as to the meaning and vernacular in the street of the expression "O. K."

This motion was denied by the court (Tr. 178, 179).[1]

The defendant then moved the court for a directed verdict "on each of the causes of action that have been retained in the case, severally * * *" (Tr. 179).

This motion, likewise, was denied by the court. (Tr. 197, 198.)

Thereupon, the defendant proceeded with its case and produced witnesses for and in its behalf. (Tr. 199-327.)

At the close of all the evidence, and while the instructions for the jury were under consideration by the trial judge, the plaintiffs, without objection by the defendant, and with the assent of the court, withdrew the 3rd (Tr. 387) and 7th (Tr. 389) causes of action, and elected to go to the jury on the four remaining causes of action above enumerated. (Tr. 390.)

The court granted Instructions Nos. 1, 4, 7 (as modified), and 12 (as finally modified), and the defendant excepted as to each. (Tr. 384.)

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[1] Reference to the transcript of record in this court is designated by the letter "R".

Reference to the transcript of the testimony in the trial is designated "Tr."

The defendant then renewed its motion for a directed verdict, severally, as to the respective causes of action that are set forth in the amended complaint. (Tr. 336.) These motions were again denied. (Tr. 384, 388, 390, 391.)

The case was submitted to the jury following the charge by the court (Tr. 394-400), and the jury returned a "unanimous" verdict for the plaintiffs in the sum of $17,000.00 with interest at six per cent from January 1, 1943, to date. (Tr. 402-406.)

Thereafter, the defendant filed a motion to set aside the verdict of the jury and the judgment entered thereon and to enter judgment for the defendant; or, in the alternative, for a new trial.

Pursuant to argument had on the motion of the defendant, the District Judge filed a memorandum denying the motions of the defendant (R. 8-18) and entered an order overruling the motions of the defendant for the reasons stated in his written memorandum (R. 19, 20).

The defendant thereafter perfected its appeal to the United States Circuit Court of Appeals for the Fourth Circuit and the cause came on to be heard on March 16, 1945, before Parker, Soper and Dobie, Circuit Judges, and was submitted (R. 115). Supplemental briefs were requested by the court and filed. (R. 115.)

On May 12, 1945, the Circuit Court of Appeals filed its opinion and reversed and remanded the case to the District Court with direction that judgment be entered for the defendant (R. 116-126).

Thereafter, a petition for rehearing and reargument and stay of mandate was filed for the plaintiffs and presented on June 11, 1945, and on June 12, 1945, the Circuit Court of Appeals denied a rehearing.

Jurisdiction of This Court

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. A. Sec. 347(a).

Questions Presented

1. Whether the evidence adduced at the trial in the District Court, with the inferences fairly and reasonably arising therefrom, was sufficient to warrant the submission to the jury of the issues.

2. Whether the evidence adduced constituted substantial evidence to take said issues to the jury.

3. Whether, by the opinion and judgment of the Circuit Court of Appeals, plaintiffs were denied their constitutional right to have a jury pass upon the facts in the case.

Reasons for Granting Writ

1. The United States Circuit Court of Appeals for the Fourth Circuit, by its said opinion and judgment in this cause, has denied the petitioners the right to have the judgment of a jury on the questions of fact presented at the trial before the District Court of the United States for the Eastern District of Virginia (Alexandria Division).

2. The United States Circuit Court of Appeals for the Fourth Circuit invaded the province of the jury.

3. The United States Circuit Court of Appeals for the Fourth Circuit had no authority to reverse the judgment of the District Court and remand this cause to that court with direction that final judgment be entered for the defendant.

Prayer

Wherefore, the petitioners respectfully pray that:

1. A writ of certiorari be issued by this honorable court directed to the United States Circuit Court of Appeals for the Fourth Circuit for the review by this court of its said opinion and judgment.

2. Upon such review, the judgment of the Circuit Court of Appeals for the Fourth Circuit be reversed.

3. Petitioners may have such other relief as this honorable court may deem appropriate.

Respectfully submitted,

JOHN PAUL JONES,
Counsel for Petitioners.

Of Counsel:
JAMES V. CONNELLY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No.

ARTHUR McALEENAN, HENRY J. McALEENAN, H. ALVIN McALEENAN, ALVINA V. McALEENAN, KATHERINE McALEENAN FAGAN, MARGERY McALEENAN O'SULLIVAN, KENNETH K. McALEENAN AND THERESA R. HAGGERTY, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF "McALEENANS,"

Petitioners,

vs.

GEORGE D. HORNING, INCORPORATED, A CORPORATION

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit which plaintiffs here seek to have reviewed, appears on pages 116-126, inclusive, of the printed transcript of the record filed herewith.

The opinion has been published in 149 Fed. (2d) 561.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. A. 347(a).

Statement of the Facts

The defendant, George D. Horning, Incorporated, is engaged in the pawnbroking business in Arlington County, Virginia. It is a family affair, and James B. Horning and Harold L. Hoffman have "actively run the business for the corporation." (Hoffman, Tr. 202, 203.) Hoffman had no official title, but he was in charge when James B. Horning was not there. (Horning, Tr. 168; Hoffman, Tr. 255.)

George D. Horning, Sr., founder of the firm, died July 19, 1938. (Hoffman, Tr. 201; Horning, Tr. 278.)

Mrs. Margaret Boyle became a customer of George D. Horning, Sr., in 1935 or 1936. James B. Horning first became acquainted with her at that time. (Horning, Tr. 277, 278.)

Harold L. Hoffman first met Mrs. Boyle in 1937, but she had been doing business with the defendant previous to that time, obtaining "loans on jewelry; just normal transactions." (Hoffman, Tr. 202, 203.)

After the death of George D. Horning, Sr., Mrs. Boyle continued to do business with the defendant and Hoffman personally handled some of the transactions with her. (Hoffman, Tr. 204.) From 1937 to 1941, the majority of the loans (to Mrs. Boyle) were for two to three hundred dollars." (Hoffman, Tr. 236, R. 92.)

"But in 1941, after March, she began pawning big stuff." (Hoffman, Tr. 237; R. 92.) And on June 29, 1941, Mrs. Boyle had $30,000.00 in loans with the defendant. (Hoffman, Tr. 238; R. 94.)

James B. Horning did not know how much Mrs. Boyle had in pledge with his company, but his mother, a member of the board of directors, advised him that Mrs. Boyle had in too much stuff (Horning, Tr. 300), after taking stock early in June. "It takes about three weeks to take stocks." (Horning, Tr. 306.)

On June 14, the defendant loaned Mrs. Boyle $2,900.00, and it was a little before or about that time that the Board of Directors met. (Horning, Tr. 307.) The Board of Directors advised Hoffman that the limit of Mrs. Boyle's credit had been reached. (Hoffman, Tr. 206, 237; R. 93; Horning, Tr. 283; R. 103.)

When James B. Horning was asked (Tr. 300) if it did not cause him to be a little suspicious of Mrs. Boyle when she pawned four diamond bracelets within a period of ten days (April 25, 1941, to May 6, 1941) for $6,950.00, he replied:

> "I answer that by saying before that she had very beautiful jewelry that she had to take out of France because she could not take the money.
> "So, I had no suspicion."

Notwithstanding the fact that Mrs. Boyle had $30,000.00 in loans with the defendant, and notwithstanding the fact that the Board of Directors had advised Hoffman that the limit of Mrs. Boyle's credit had been reached, *Mrs. Horning, mother of James B. Horning and a member of the Board, gave Hoffman authority to loan Mrs. Boyle more money on June 30, 1941,* "to tide her over until she could get a further loan on the jewelry we did not want to take." (Hoffman, Tr. 239; R. 94.)

On June 30, Hoffman loaned Mrs. Boyle $2,100.00 on jewelry later pledged with McAleenans; on July 1, $1,050.00 on the same jewelry; and on July 2, another $1,050.00 on the same jewelry. (Hoffman, Tr. 237, 238; R. 93.) And on

July 1, he loaned her $300.00 on a diamond pin. (Horning, Tr. 304, 305; R. 83.)

When Mrs Boyle came in to Horning's with the jewelry later pledged at McAleenans, *Hoffman* told her that he had been instructed that, "due to the number of loans Mrs. Boyle had already, had in pawn, we could not take any further loans from her." (Hoffman, Tr. 206.) *He then suggested that she go to New York to obtain a loan,* and she asked him to go with her. *Hoffman said that he could not go without the permission of Mr. Horning.*

The "temporary" loan of $4,500.00 made by the defendant to Mrs. Boyle on June 30, July 1 and July 2, was made on the security of a diamond bracelet and clip combination piece and a star sapphire ring ($4,200.00)—(Plaintiff's Exhibit No. 11)—and a diamond pin ($300.00). (Horning, Tr. 172.) The diamond bracelet and clip combination piece and the star sapphire ring were two of the three pieces pawned at McAleenans. The diamond necklace—the third piece pawned there—was left by Mrs. Boyle with the defendant for "safekeeping." (Hoffman, Tr. 215, 239, 240; R. 95.)

Hoffman and Horning both considered the loan of $4,500.00 to Mrs. Boyle "a small loan." (Horning, Tr. 285, 310.) From their viewpoint, this would seem justifiable from the loans they made to her from March 14, 1941, to July 2, 1941, inclusive. (See Cross-Examination of Mr. Horning, Tr. 295-305.)

On Monday, July 7, Horning authorized Hoffman to go to New York with Mrs. Boyle (Horning, Tr. 172, 284, 285) "for the simple reason that *Mr. Hoffman knew pawnbrokers in New York and knew the different good ones,* and Mrs. Boyle did not." (Horning, Tr. 172.)

On Tuesday, July 8, Hoffman went to New York by plane and took the jewelry with him. (Horning, Tr. 174; Hoff-

man, Tr. 213, 239, 240; R. 95.) Mrs. Boyle met him at the Lexington Hotel. (Hoffman, Tr. 214.)

Hoffman met Mrs. Boyle in New York for the accommodation of the defendant (R. 96).

Horning gave Hoffman authority to go to New York with Mrs. Boyle and gave Hoffman a letter of introduction (Horning, Tr. 168, 172, 173, 284, 312).

Whatever Hoffman did while he was in New York, he did with the approval and permission of Horning (Horning, Tr. 169, 170, 175, 312).

At about 10:30 a. m., Hoffman telephoned McAleenans and spoke to Mr. Kelly, office manager of the plaintiffs. Hoffman identified himself as representing Horning's—"the pawnbrokers" (Kelly, Tr. 78, 79; R. 79, 80). Hoffman and Mrs. Boyle came in to McAleenans about 3:30 p. m. (McAleenan, Tr. 22, 23; Kelly, Tr. 79; R. 80). Hoffman presented McAleenan with the letter of introduction (McAleenan, Tr. 23; R. 21, 22). It read as follows:

"July 8, 1941.

"To Whom It May Concern:

"This letter will introduce, Mr. Harold L. Hoffman, who is in our employ and is authorized by us to place in pawn for one of our customers, a Mrs. M. Boyle of Washington, D. C., several pieces of diamond jewelry.

"George D. Horning, Inc., by Jas. B. Horning."

Hoffman told McAleenan that he wanted a loan of $20,000.00 for Mrs. Boyle, and produced from his person four pieces of jewelry. He assured McAleenan that Mrs. Boyle was the owner of the jewelry and was a very prominent woman in Washington and had done business with Horning and Company for many, many years (McAleenan, Tr. 24, 25; R. 22, 23). McAleenan read the letter and told Hoffman that he wanted to verify the fact and placed a

particular party call for James B. Horning at Arlington, Virginia (McAleenan, Tr. 25; R. 23; Horning, Tr. 286, 287; R. 66). McAleenan asked Horning if Mrs. Boyle was "*O. K.,*" and Horning told him that she was "*all right*" (McAleenan, Tr. 26; R. 24; Horning, Tr. 288; R. 67).

> "The term 'O. K.' means 'all right'" (McAleenan, Tr. 27, 28; R. 24, 25, 26; Kelly, Tr. 77, 78, 89, 93; R. 54, 56, 57; Blauweiss, Tr. 99, 100, 139).
> See also 46 C. J. 1088.

Horning then told McAleenan that the reason that he was not making the loan himself was because that "since his father died the Board of Directors had restricted loans to any one individual to the extent of *Twenty-five Thousand Dollars*" (McAleenan, Tr. 26; R. 24).

Neither Horning, Hoffman, nor Mrs. Boyle told McAleenan that the jewelry then offered by Hoffman and Mrs. Boyle as a pledge for the loan was actually then in pawn with the defendant (McAleenan, Tr. 73; R. 78; Horning, Tr. 319; R. 110).

Kelly appraised the jewelry at $15,000.00 but McAleenan, "realizing the connection of Horning in this instance," raised it to $17,000.00, and, *at the request of Hoffman,* reduced the interest rate from 18% to 14%, whereupon Hoffman said: "*We* will take the Seventeen Thousand Dollars" (McAleenan, Tr. 28, 29, 35, 36; R. 56, 57).

McAleenan instructed his cashier to draw a check to the order of Horning and Company, and, at the same time, told Kelly to draw the pawn ticket. The check was given by McAleenan to *Hoffman,* who, after consulting with Mrs. Boyle, requested that the check be drawn to her order, remarking to Mrs. Boyle: "*It is six of one and a half dozen of the other, you can endorse the check over to us*" (McAleenan, Tr. 29; R. 27).

Thereupon, a second check for $17,000.00 was drawn to

the order of Mrs. M. Boyle (McAleenan, Tr. 29-32, 58, 59; R. 28), and, *at the request of Hoffman,* the loan was broken down on the pawn ticket (McAleenan, Tr. 36, 37; R. 30).

This second check was handed to Mrs. Boyle, and by her delivered to Hoffman (Hoffman, Tr. 249, 250), and thereafter endorsed by Mrs. Boyle to the defendant (McAleenan, Tr. 30; Hoffman, Tr. 250; Horning, Tr. 289, 317; R. 104, 105).

Had McAleenan known that the jewelry offered him in pledge was then actually in pawn with the defendant, he would not have made the loan (McAleenan, Tr. 64, 73; R. 78).

Mrs. Boyle and Mr. Hoffman were in McAleenan's private office together at all times during the transaction. (McAleenan, Tr. 25, 37, 38; R. 23, 72, 73; Kelly, Tr. 82, 88; R. 81).

After the deal was consummated, McAleenan and Mrs. Boyle discussed their travels in Europe and the mutual places that they had visited (McAleenan, Tr. 55, 56; R. 38, 39).

After Hoffman and Mrs. Boyle left McAleenans with the check for $17,000.00, Hoffman called Horning and requested him to send up the balance of the jewelry that she had in pawn with the defendant. *Horning sent the jewelry to Hoffman* by insured express (Hoffman, Tr. 257; Horning, Tr. 313, 314).

Mr. Hoffman and Mrs. Boyle again came into McAleenan's office on July 9, presenting new pieces of jewelry and requesting a loan of Fifteen Thousand Dollars. McAleenan offered $12,500.00 to Hoffman and "*they* asked for time to think it over and left the office." (McAleenan, Tr. 38, 62; R. 30, 45, 46; Hoffman, Tr. 222). *This jewelry was in the possession of Hoffman* and McAleenan gave it back to him after the appraisal and refusal by them of the loan (McAleenan, Tr. 39; R. 73).

On July 11, Mrs. Boyle called McAleenan and told him that other arrangements had been made on the second lot of jewelry (McAleenan, Tr. 39, 63; R. 46).

In the meantime, after leaving McAleenan's office on July 9, Mr. Hoffman and Mrs. Boyle went to Simpson's, where they obtained a loan of $13,000.00 (Hoffman, Tr. 247, 249; Horning, Tr. 317).

On July 10, Hoffman and Mrs. Boyle went to the Consolidated where they obtained a loan for $15,000.00 (Hoffman, Tr. 248, 249; Horning, Tr. 317).

All of the jewelry offered in pawn by Hoffman and Mrs. Boyle to Simpson's and the Consolidated for security for those loans, as well as the combination piece and star sapphire ring pawned with McAleenans were pledged with the defendant, George D. Horning, Inc. (Hoffman, Tr. 248, 249; R. 96; Plaintiff's Exhibit No. 11).

Hoffman did not tell Simpson's or Consolidated that they had obtained the loan at McAleenans, and he did not tell Consolidated that he had obtained the loan at Simpson's (Hoffman, Tr. 248; R. 95, 96).

Hoffman sold a number of pieces of jewelry to some New York dealers for $9,000.00 (Hoffman, Tr. 224, 225, 250, 251, 264; R. 91, 96), and he gave the New York dealers a bill of sale on Horning stationery for the jewelry as agent for Mrs. Boyle (Hoffman, Tr. 225, 259; R. 91, 97). This jewelry was in pawn at Horning's and the defendant had a lien on it (Hoffman, Tr. 224, 251; R. 91, 96).

Mrs. Boyle turned over all of the checks to Hoffman (Hoffman, Tr. 249, 250). And when they had finished disposing of the jewelry Hoffman had in his possession, he returned to Washington with the checks aggregating $54,000.00 (Hoffman, Tr. 250).

Hoffman returned to Washington from New York on July 10 (Hoffman, Tr. 251; Horning, Tr. 317).

On July 11, Mrs. Boyle came to Horning's office (Hoffman, Tr. 251; Horning, Tr. 318), and Horning and Hoffman gave her $10,000.00 out of the $54,000.00 (Hoffman, Tr. 223, 224, 251; R. 64; Horning, Tr. 318; R. 110).

All four of the checks were deposited to the credit of George D. Horning, Inc., after they were endorsed by Mrs. Boyle (McAleenan, Tr. 31; Hoffman, Tr. 223, 250, 252; Horning, Tr. 289, 317; R. 104, 105, 110).

Jack Blauweiss, a diamond broker, first met Mrs. Boyle on March 13, 1941 (Blauweiss, Tr. 102; R. 83-84). He began to transact business with her on memorandum (Blauweiss, Tr. 105, 107; R. 84). The jewelry involved in this case was entrusted to Mrs. Boyle for sale, and the specific pieces pawned by Hoffman and Mrs. Boyle with McAleenan's were delivered by Blauweiss to Mrs. Boyle between June 27 and July 1, 1941.

Blauweiss thoroughly explained to Mrs. Boyle that he held the jewelry on memorandum from manufacturing jewelers, and that it was not his property. Title to the jewelry never passed to Blauweiss, nor did he ever pass title to Mrs. Boyle (Blauweiss, Tr. 108, 109, 110).

On July 15, 1941, Blauweiss learned that a society woman from Washington was in New York "unloading a lot of jewelry or pawning jewelry all over New York," and that a flower pin (Plaintiff's Exhibit No. 10-C) that he had given to Mrs. Boyle on memorandum had been offered for sale to the jeweler who had manufactured it for "a considerable amount of money less" than he had given it on memorandum to Blauweiss and his associates (Blauweiss, Tr. 111). *This was one of the pieces that Hoffman had sold to the New York dealers* (Hoffman, Tr. 255).

Blauweiss confronted Mrs. Boyle with these facts at the Plaza Hotel on the same day—*July 15*. She denied the accusations, but assured Blauweiss that she would pay

him on Monday, July 21. He permitted her to return to Washington that day—(*July 15*) (Blauweiss, Tr. 113, 114).

Mrs. Boyle had been pawning all of the jewelry that she had received on memorandum from Blauweiss with the defendant, George D. Horning, Incorporated (Discussion in Chambers, Tr. 117; Blauweiss, Tr. 125, 127; Horning, Tr. 295-305).

On *July 18, James B. Horning telephoned McAleenan* (McAleenan, Tr. 39; R. 31; Hoffman, Tr. 260), and said:

> "Mr. McAleenan, there is something funny about this jewelry. I wish you would place a 'stop' on it."

McAleenan said:

> "All right, Mr. Horning, I shall be very glad to. I am sorry you are in trouble."

McAleenan put the "stop" on the jewelry for Horning (McAleenan, Tr. 39, 40; R. 31, 32).

On July 21, Mrs. Boyle returned to New York, and Blauweiss met her at the Plaza Hotel at 10 a. m. (Blauweiss, Tr. 115, 116).

On July 21, *Horning called McAleenan* by telephone and asked him what the interest on "that loan of Seventeen Thousand Dollars" amounted to. McAleenan told Horning to forget about the interest—"send me your check for Seventeen Thousand Dollars and the ticket and I will gladly surrender the jewelry" (McAleenan, Tr. 40, 41; R. 33; Horning, Tr. 292; R. 68).

On July 21, *Hoffman returned to New York with a check for $17,000.00 drawn by Horning to the order of McAleenan* (Horning, Tr. 292; R. 68, 69; Hoffman, Tr. 225, 260; R. 91, 97; (By the Court), Tr. 270, 271; R. 101, 102). Hoffman arrived in New York about 1 p. m. (Blauweiss, Tr. 116, 125, 126; R. 87).

After Blauweiss met Mrs. Boyle, she left the hotel for a time, returning at about 1 o'clock in the afternoon. Blauweiss met her in the lobby and went up to her room (Blauweiss, Tr. 116). While there, the telephone rang and it was *Hoffman* calling. Hoffman requested Mrs. Boyle to come to the Hotel Lexington to see him (Blauweiss, Tr. 116, 125, 126; R. 87; Hoffman, Tr. 260, 261).

Blauweiss accompanied Mrs. Boyle to the Lexington (Blauweiss, Tr. 126; R. 85; Hoffman, Tr. 261, 262; R. 98). *Hoffman refused to see Blauweiss until he had talked to Mrs. Boyle* (Blauweiss, Tr. 126; R. 86; Hoffman, Tr. 261; R. 98). Mrs. Boyle went up to Hoffman's room, and after he had talked to her, Blauweiss went up (Blauweiss, Tr. 127; Hoffman, Tr. 226, 262; R. 86). Blauweiss was asked (127; R. 86, 87):

> "By Mr. Jones:
>
> "Q. What did Mr. Hoffman say to you?
> "A. He said: 'I am sorry, Jack, but you are holding the bag.'
> "I said: 'What do you mean by holding the bag?'
> "Q. What did he say?
> "A. He said—I asked him: 'What do you mean by holding the bag?'
> "He said: 'Well I didn't know that Mrs. Boyle turned the tickets over to you. *I had the intention to redeem all the merchandise.* I had intended—that is the purpose I was down in New York for, for that sole business.'" (Italics ours.)

Blauweiss refused to surrender the tickets and Hoffman returned to Washington with the $17,000.00 check (Hoffman, Tr. 229; Horning, Tr. 293; R. 69).

On July 22, Mrs. Boyle was arrested, and between 8 and 9 o'clock p. m., with the permission of Detective Kennedy and Blauweiss, *she called James B. Horning* (Blauweiss, Tr. 131, 132; R. 87, 88; Horning, Tr. 291, 292, 326;

R. 106). She told Horning that she was "in a little jam" (Horning, Tr. 291; R. 106); that "*you have got me in a lot of trouble*" (Blauweiss, Tr. 131; R. 88). Horning refused to help her (Blauweiss, Tr. 132; R. 88; Horning, Tr. 292; R. 107).

On July 25, the New York police put an official "Stop" on the jewelry pledged with McAleenan (McAleenan, Tr. 42, 43).

Thereafter, McAleenans was sued in the Supreme Court of New York County, and that court entered judgments against McAleenans for the return of the jewelry to the manufacturing jewelers, interest and costs (McAleenan, Tr. 43, 44, 45, 46; R. 73, 74, 75, 76; Plaintiff's Exhibits Nos. 6 and 7).

After McAleenans returned the jewelry pursuant to these judgments to the legally adjudicated owners, McAleenan made demand upon George D. Horning, Incorporated, for payment (McAleenan, Tr. 46, 47; R. 76), which payment was duly refused, and thereupon this action was brought.

Specifications of Error

The United States Circuit Court of Appeals for the Fourth Circuit erred:

1. In holding and deciding that the District Court erred in denying defendant's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial.

2. In holding and deciding that there was no substantial or sufficient evidence to support or sustain the verdict on any of the causes of action upon which plaintiffs rely.

3. In holding and deciding that notwithstanding the verdict was approved by the trial court, it could be disturbed on appeal.

4. In holding and deciding that the motion for a directed verdict should have been granted at the close of all the evidence.

5. In holding and deciding that there was no evidence to support the fifth cause of action that the monies were borrowed from McAleenans jointly by the defendant and Mrs. Margaret Boyle.

6. In holding and deciding that there was no evidence that Mrs. Boyle was acting as agent for the defendant, George D. Horning, Incorporated, in negotiating the loan with the plaintiffs.

7. In holding and deciding that the plaintiffs did not loan the money to the defendant.

8. In holding and deciding that there was no evidence on which the court might instruct the jury with reference to an understanding on the part of both parties that defendant was the debtor.

9. In holding and deciding that there was no evidence upon which the case might go to the jury under the ninth cause of action for money had and received.

10. In holding and deciding that there was no evidence of a joint enterprise between the defendant and Mrs. Boyle.

11. In holding and deciding that there was no evidence that the defendant knew of the fraudulent character of the transaction in which Mrs. Boyle was engaged.

12. In holding and deciding that the trip to New York made by Mrs. Boyle and Mr. Hoffman was at her expense and on her request.

13. In holding and deciding that the evidence did not show sufficient facts to sustain an action in assumpsit.

14. In holding and deciding that the evidence was not sufficient to make the case one for the jury.

15. In reversing the judgment of the District Court and remanding the cause to that court with direction to enter judgment in favor of the defendant.

Summary of the Argument

1. When supported by credible evidence, the verdict of a jury on questions of fact is conclusive on an Appellate Court.

2. The verdict of the jury has been approved by the Trial Court and its conclusion as to the sufficiency of the evidence to sustain the verdict should not be disturbed on appeal.

3. The exception of the defendant to the denial of its motion for a directed verdict at the close of plaintiffs' case was waived by the defendant when it proceeded with its case upon its evidence.

4. Upon renewal of the motion for a directed verdict at the close of all of the evidence, all of the evidence must be taken into consideration, that introduced by the plaintiffs originally, and that introduced by either party subsequently.

5. Mrs. Boyle and Harold L. Hoffman were the agents of the defendant, George D. Horning, Incorporated.

6. George D. Horning, Incorporated, and Mrs. Boyle were joint adventurers and jointly borrowed the money from McAleenans, and the loan was made by the plaintiffs to the defendant and Mrs. Boyle for their joint benefit.

7. General assumpsit, as well as an action for fraud and deceit, will lie in a case circumstanced as this one.

8. The sixth cause of action is for money lent.

9. The eighth cause of action is for money paid.

10. The ninth cause of action is for money received.

11. The action of the Circuit Court of Appeals in reversing the judgment of the District Court and remanding the cause to that Court with direction that final judgment be entered for the defendant deprives the plaintiffs of their Constitutional right to a trial by jury.

ARGUMENT

1. When supported by credible evidence, the verdict of a jury on questions of fact is conclusive on an Appellate Court.

It is the well-settled rule of decision of this Court that on the question whether a case was made entitling the plaintiff to the judgment of a jury the evidence is to be viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every inference favorable to him that may be fairly and reasonably drawn from the evidence; that it is the province of the jury to resolve all conflicts in the evidence and to pass upon the credibility of the witnesses and the weight to be given to their testimony; and that if, on any determinative issue in the case, reasonable and fair-minded men may honestly draw different inferences or conclusions from the evidence, such issue is one for the jury. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610; *New York Central R. Co.* v. *Marcone*, 281 U. S. 345, 349, 74 L. Ed. 892; *Gunning* v. *Cooley*, 281 U. S. 90, 94, 74 L. Ed. 720; *Best* v. *District of Columbia*, 291 U. S. 411, 415, 416, 78 L. Ed. 882; *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 190-193, 58 L. Ed. 906; *Western & Atlantic R. Co.* v. *Hughes*, 278 U. S. 496, 497, 498, 73 L. Ed. 473.

The verdict of a jury on questions of fact, which is supported by credible evidence, will not be disturbed by the reviewing court. *Prudential Ins. Co.* v. *Carlson*, 126 F. (2d) 607; *McVeigh* v. *McGurren*, 117 F. (2d) 672 (cert. den. 313 U. S. 573, 85 L. Ed. 1513); *Crowell* v. *Duncan*, 145 Va. 489,

498, 134 S. E. 576, 50 A. L. R. 1425. And no rule of appellate practice is more firmly settled than that the weight of the evidence is for the jury passing on the facts. *Egan Chevrolet Co.* v. *Bruner,* 102 F. (2d) 373, 122 A. L. R. 987, 993, and cases therein cited. See also *Goodwin* v. *U. S.,* 2 F. (2d) 200, 201.

On appeal, the evidence must be construed most favorably in support of the verdict, and conflicts must be resolved in its favor. *Woodburn* v. *Standard Forging Corp.,* 112 F. (2d) 271, 129 A. L. R. 337, 342; *Egan Chevrolet Co.* v. *Bruner, supra; Chicago, St. P., M., M. & O. R. Co.* v. *Kulp,* 102 F. (2d) 352, 133 A. L. R. 1445, 1451, 1452. In the latter case it was said:

> "It is the duty of this court, as it was of the trial court, to take the most favorable view of the plaintiff's evidence and of the inferences reasonably and justifiably to be drawn therefrom and we cannot hold that the verdict was unsupported if there was before the jury any substantial evidence proper for admission. Humes v. United States, 170 U. S. 210, 18 S. Ct. 602, 42 L. Ed. 1011; Worthington v. Elmer, 6 Cir. 207 F. 306."

The rule is well established that the verdict of a jury, based upon conflicting evidence, constitutes a final determination of the disputed facts. *Friedman* v. *Decatur Corp.,* 135 F. (2d) 812, 77 U. S. App. D. C. 326, 330 (aff. 39 F. Supp. 692); *Edwards* v. *B. & O. R. Co.,* 131 F. (2d) 366; *Fleishman Matting Co.* v. *Mrkacek,* 14 F. (2d) 602, 603; *Chesapeake Ferry Co.* v. *Cummings,* 158 Va. 33, 37, 164 S. E. 281.

In the Friedman case, the court said:

> "The verdict of a jury, like the findings of a judge who tries a case without a jury, constitutes a final determination of disputed facts, where the evidence is of such character that intelligent persons may honestly differ as to what was actually proved. We are satis-

fied that the evidence was sufficient to support the verdict, and that the trial court acted clearly within the scope of its authority and discretion in refusing to direct a verdict."

One ground upon which the rule is rested is that the jury has the advantage, which is denied to the appellate court, of seeing the witnesses and observing the manner in which they testify, and for this reason, the jury may be deemed more competent to say what weight should be accorded the testimony and the evidence. *Copp* v. *VanHise,* 119 F. (2d) 691; *Anzano* v. *Metro. Life Ins. Co.,* 118 F. (2d) 430 (aff. 32 F. Supp. 417); *Egan Chevrolet Co.* v. *Bruner, supra.*

The rule might also be rested upon the ground that an appellate court should not assume the power of dictating to juries that they must believe evidence against their own convictions as to the truth. *Christie* v. *Callahan,* 124 F. (2d) 825, 75 U. S. App. D. C. 133, 134, 135, where the court said:

> "* * * Our function is not to weigh the evidence factually as the jury does. It is to decide whether plaintiff's case, as made, was strong enough for us to allow the jury to consider it. To do this we must apply some standard. *But we cannot weigh plaintiff's case against defendants'. Less than preponderance is sufficient.*" (Italics ours.)

Mr. Justice Rutledge, speaking for the court, then observed:

> "The danger to be guarded against is a too obvious and gross miscarriage of justice, a departure too far from established lines of liability. *Facts are primarily within the jury's function. Hence it must be given wide latitude, or trial by jury becomes trial by court* * * *." (Italics ours.)

And see also the very recent case of *Tennant* v. *Peoria & Pekin Union R. Co.,* (decided January 17, 1944), 321 U. S.

29, 88 L. Ed. 322, 323, 325, 326, in which certiorari was granted "because of important problems as to petitioner's right to a jury determination of the issue of causation" (p. 323).

2. The verdict of the jury has been approved by the Trial Court and its conclusion as to the sufficiency of the evidence to sustain the verdict should not be disturbed on appeal.

The verdict of the jury has been approved by the trial judge, and the salutary rule discussed above is especially applicable where the trial court has refused to set the verdict aside, for in such a case, not only does the verdict of the jury carry with it the indorsement of the jury who have seen the witnesses, but also that of the trial judge who has had the same advantage. See *Economon* v. *Barry-Pate Motor Co.*, 3 F. (2d) 84, 86, 55 App. D. C. 143, holding that the conclusion of the trial court as to the sufficiency of the evidence to sustain the verdict will not be disturbed on appeal. The court said:

> "So far as the alleged error rests upon the claim that the verdict was contrary to the evidence, independent of the affidavit hereinafter referred to, *the court below found that there was ample evidence to sustain the verdict, and its conclusion on that issue will not be reviewed here. Holder v. United States,* 150 U. S. 91." (Italics ours.)

See also *Christie* v. *Callahan, supra;* and, *Tabb* v. *Willis,* 155 Va. 836, 156 S. E. 556, holding that *the verdict of a jury, after approval by the trial court, is entitled to the utmost consideration on appeal.*

As is evident from the transcript, an intelligent jury closely followed the evidence and exhibits, and, after the close of the case, reached its verdict upon mature consideration of all of the evidence.

When all of the testimony is considered—when all of the evidence is appraised, even if it should be conceded that an inference might be drawn from the evidence different from that drawn by the jury and the trial court, that would not make reversal requisite. As is said in *United States* v. *Ingalls,* 114 F. (2d) 839, 72 App. D. C. 383, 386:

> "* * * Where two different conclusions may reasonably be drawn from uncontroverted evidence, the question as to which should be drawn is for the trial court and not for the appellate tribunal. Gunning v. Cooley, (1930), 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720; United States v. Gamble-Skogmo, Inc. (8 Cir. 1937,) 91 F. (2d) 372, 374; Hearst Radio, Inc. v. Good, (1937,), 67 App. D. C. 250, 251, 91 F. (2d) 555, 556; United States v. Stewart, (1932), 61 App. D. C. 115, 58 F. (2d) 520."

Of interest is the language of the court in the case of *Crowell* v. *Duncan, supra,* wherein it is said (pages 496, 497):

> "As the verdict is a general one, that is, that it did not indicate upon which theory of the plaintiff's case it was founded and as the court instructed the jury, in effect, that if they believed either theory upon which the plaintiff sought to hold the defendant liable, was supported by evidence, they should find for the plaintiff, * * *"

3. The exception of the defendant to the denial of its motion for a directed verdict at the close of plaintiff's case was waived by the defendant when it proceeded with its case upon its evidence.

The court properly denied the motion at the close of the plaintiff's case, for, as is said in *Erie R. Co.* v. *Rooney,* 186 Fed. 16, 19:

> "A verdict is properly directed only when the case is palpably for the party asking the direction."

And the Court of Appeals of the District of Columbia, in passing upon the question in *Takahashi* v. *The Hecht Company*, 64 F. (2d) 710, 60 App. D. C. 176, 179:

> "* * * As we have already had occasion to say in Adams v. W. & G. R. R. Co., 9 App. D. C. 26, 30: 'The court is never justified in directing a verdict except in cases where, conceding the credibility of the witnesses and giving full effect to every legitimate inference that may be deduced from their testimony, it is nevertheless plain that the party has not made out a case sufficient in law to entitle him to a verdict and judgment thereon.' See Glaria v. Washington Southern R. R. Co., 30 App. D. C. 559, and Chesapeake Beach Ry. Co. v. Brez, 39 App. D. C. 58 * * * we think there was enough to take it to the jury."

After its motion was denied, the defendant elected to put in its defense, and presented testimony and evidence in support thereof. *By so doing, it waived its exception. Gas Consumers' Assn.* v. *Lely*, 57 F. (2d) 395, 61 App. D. C. 29, 30, where the court said:

> "Of these assignments of error, the first is based upon the denial of a motion for a directed verdict at the close of the plaintiff's case, the exception to which was waived by the defendant company when it proceeded with its case upon its evidence, and therefore requires no discussion here."

4. Upon renewal of the motion for a directed verdict at the close of all of the evidence, all of the evidence must be taken into consideration, that introduced by the plaintiffs originally, and that introduced by either party subsequently.

Upon the renewal of its motion for a directed verdict at the close of all the evidence, a different situation was presented. Plaintiffs were then entitled to every inference deducible from every material fact presented by the entire

evidence favorable to it, whether such facts and inferences were developed by witnesses for the defendant, or witnesses for the plaintiffs. The court properly took the entire evidence into consideration when it denied the defendant's second motion.

The rule applicable is clearly stated in *Detroit United Ry. Co.* v. *Nichols,* 165 Fed. 289, 295, where the court said:

> "* * * At the conclusion of the plaintiff's evidence the defendant moved for a directed verdict. This was denied, and an exception reserved. The defendant then introduced evidence, and at the conclusion of all the testimony renewed its motion for a directed verdict upon the whole of the evidence. This was denied, and the case submitted to the jury, who found for the plaintiff. The introduction of evidence after a peremptory charge at the conclusion of the plaintiff's evidence was a waiver of that motion, and *no error can now be assigned to that action of the court. Accident Ins. Co.* v. *Crandal,* 120 U. S. 527, 30 L. Ed. 740, 7 S. Ct. 685; *Union Pac. Ry. Co.* v. *Calaghan,* 161 U. S. 91, 40 L. Ed. 628, 16 S. Ct. 493; *Travelers Ins. Co.* v. *Randolph,* 78 Fed. 754, 759. *But such a motion may be renewed at the close of all the evidence, in which case the whole of the evidence, that introduced by the plaintiff originally and that introduced by either party subsequently, must be taken into consideration. Travelers Ins. Co.* v. *Randolph,* cited above * * *." (Italics ours.)

5. Mrs. Boyle and Harold L. Hoffman were the agents of the Defendant, George D. Horning, Incorporated.

On June 29, 1941, Mrs. Boyle had pledges with the defendant securing the sum of $30,000.00 which it had loaned to her.

Prior to the month of March, 1941, Mrs. Boyle had been doing business with the defendant, obtaining loans on jewelry, but these were just "normal" transactions.

In March, 1941, she began to pawn "big stuff," and before the defendant realized it, she had obtained $30,000.00 from them, and they held jewelry that they desired to "unload."

The business transactions with Mrs. Boyle after March 13, 1941, were sufficient to put any reasonable and prudent man on suspicion, particularly when she pawned four diamond bracelets within a period of ten days (April 25, 1941, to May 6, 1941—Tr. 300, 301; R. 108), and the following appears on the cross-examination of James B. Horning:

> "(By Mr. Jones): So that on April 25th for one thousand she pawned a diamond bracelet; on April 28th for four fifty she pawned a diamond bracelet; on May 5th, for four thousand she pawned a diamond bracelet; on May 6th, for fifteen hundred she pawned a diamond bracelet.
>
> "Is that correct?
>
> "A. I can not go back to all that time.
>
> "Q. Mr. Horning, here is a woman that pawns four diamond bracelets within a period of about ten days.
>
> "Didn't that cause you to be a little suspicious of Mrs. Boyle?
>
> "A. I answered that by saying before that she had very beautiful jewelry that she had to take out of France because she could not take the money.
>
> "So, I had no suspicion.
>
> "Q. But you did bring to the attention of your Board of Directors the fact that Mrs. Boyle was pawning an awful lot of stuff in the store, and your Board of Directors decided to stop any further loans.
>
> "A. I did not.
>
> "Q. Then, what did you do?
>
> "A. My mother, who happens to be a member of the Board of Directors advised me Mrs. Boyle had in too much stuff.
>
> "I did not——
>
> "Q. (interposing): In other words: *You were not interested in the stuff she was pawning with you so long as you had security for your loan value.*

"A. *That's right.*

"Q. *You were not interested in the interest you were getting on this stuff either?*

"A. *Like every pawn broker.*" (Italics ours.)

Is it reasonable to suppose that a woman who had had only "normal" transactions with the defendant prior to March, 1941, would pawn four diamond bracelets within six weks thereafter?

The defendant must have been on notice, notwithstanding the fact that Mr. James B. Horning never knew just how much she did have in, because his mother began "taking stock" and found out the situation. Thereafter, the Board of Directors limited Mrs. Boyle's credit and directed that no further loans be made to her.

Of interest is Section 4455 of the Virginia Code of 1942:

> "4455. **In relation to the fraudulent conversion or removal of property subject to a lien or the title to which is in another.**—Whenever any person is in possession of any personal property, including motor vehicles, in any capacity, the title or ownership of which he has agreed in writing shall be or remain in another, or on which he has given a lien, and such person so in possession shall fraudulently sell, pledge, pawn, or remove from the premises where it has been agreed that the property shall remain, and refuse to disclose the location thereof, or otherwise dispose of the property or fraudulently remove the same from the State, without the written consent of the owner or lienor or the person in whom the title is, or if such writing be a deed of trust, without the written consent of the trustee or beneficiary in such deed of trust, he shall be deemed guilty of the larceny thereof; and in any prosecution hereunder, the fact that such person after demand therefor by the lienholder or person in whom the title or ownership of the property is, or his agent, shall fail or refuse to disclose to such claimant or his agent, the location of the property, or to surrender the

same, shall be prima facie evidence of the violation of the provisions of this section. The venue of prosecutions against persons fraudulently removing any such property, including motor vehicles, from the State shall be the county or city in which such property or motor vehicle was purchased or in which the accused last had a legal residence.

"This section shall not be construed to interfere with the rights of any innocent third party purchasing said property, unless such writing shall be docketed or recorded as provided by law."

It is clear from the section just quoted that Horning had a lien on the jewelry that was later pledged at McAleenans by Hoffman and Mrs. Boyle.

By virtue of the express provisions of Section 4455, Mrs. Boyle could not have pledged the property with McAleenans without the consent of the defendant Horning without being guilty of larceny. Consequently, in pledging the property with McAleenans for the loan Mrs. Boyle was acting as the agent of Horning. Otherwise, for her to have pledged the property would have constituted a violation of the section. Furthermore, when the loan had been arranged and the check was to be drawn, *it could not have been drawn to the order of Mrs. Boyle without the consent of the defendant, George D. Horning, Incorporated.*

It must be kept in mind that McAleenan first made out the check to George D. Horning, Incorporated, and then, *at the request of Mr. Hoffman,* drew the check to the order of Mrs. Boyle when Hoffman commented: *"It is six of one and a half dozen of the other, you can endorse the check over to us."*

To go one step further, it is an undisputed fact that, immediately after she received the check from Mr. McAleenan, Mrs. Boyle turned it over to Hoffman.

This clearly indicates a previous arrangement between

Mrs. Boyle and the defendant, George D. Horning, Incorporated, that *the defendant would receive the money,* and ties in with the fact that the defendant had a lien on the property.

In repledging the jewelry with McAleenans, and in turning the money over to the defendant, *Mrs. Boyle could only have been acting as the agent of George D. Horning, Incorporated.*

And it must be remembered that *James B. Horning sent the jewelry to Hoffman*—not to Mrs. Boyle.

At no time did Mr. Hoffman surrender possession of the jewelry to Mrs. Boyle, either that pledged at McAleenans, or that later pledged by Hoffman with Simpson's and the Consolidated, or that sold by Hoffman on which *he gave a bill of sale on the Horning stationery.*

After Hoffman and Mrs. Boyle had "unloaded" the three pieces at McAleenans, *Hoffman called James B. Horning by telephone* and *Horning sent to Hoffman the balance of the jewelry* that Mrs. Boyle had in pawn with George D. Horning, Incorporated.

Not only the jury grasped the true state of affairs, but the District Judge did also (Tr. 315), when Horning said:

> "A. (Horning): Mr. Hoffman had doubt about her getting the loans, and so forth, but if she did not get the loan she wanted, and put them in anyway, and got less, *we would have kept one of the tickets and advised either McAleenans or Simpson's or Consolidated that we had a lien on the ticket.*
>
> "Q. (By the Court): You would let her put it in up there but turn over one of the tickets to you to account for your balance?
>
> "A. *That's right.*
>
> "Q. *That would indicate that you wanted to get all this stuff out of your office, would it not?*" (Italics ours).

After consummating the three loans and the sale of the jewelry, Hoffman returned to Washington on July 10 and brought with him $54,000.00 in checks drawn to the order of Mrs. Boyle, which she endorsed and which were deposited in the account of the defendant. They gave her $10,000.00, retaining $44,000.00.

It is obvious from these facts that the jury could find that *the real party in interest was George D. Horning, Incorporated,* who, through Hoffman, Mrs. Boyle and James B. Horning carefully concealed that fact from Mr. H. Alvin McAleenan.

The law is, that when an undisclosed principal is discovered, he may be proceeded against as well as his agent.

A clear statement of the general rule is found in 2 Am. Jur. 308—"Agency", Section 393—where it is said:

> "It is often said that persons dealing in their own names are presumed to deal for themselves as principals, yet if one authorized by another to act as his agent, in acting on behalf of the principal, *fails to disclose the principal to the third person, or to disclose that he is acting as agent,* the principal, when discovered, may become liable for the acts done in his behalf and may be sued thereon just as if, at the time the transaction was entered into, the agent had disclosed the fact of his agency and the identity of the principal, * * *" (Italics ours).

Of interest is the case of *Martin* v. *Hutton,* 90 Neb. 34, 132 N. W. 727, where the court held that *agency, like any other condition or fact, may be established by circumstantial evidence.*

In the final analysis, Mrs. Boyle could not have withdrawn the jewelry pawned and sold in New York by Hoffman without the permission of the defendant. James B. Horning gave that permission. He sent Hoffman to New York with Mrs. Boyle and he sent the jewelry by Hoffman.

To further substantiate the interest of George D. Horn-

ing in the matter, after Blauweiss had cornered Mrs. Boyle on *July 15* and permitted her to return to Washington on that day, James B. Horning developed pangs of remorse. He called H. Alvin McAleenan on *July 18* and asked him to put a "stop" on the jewelry. On *July 21*, Horning called McAleenan again and asked him what the interest on "that loan of $17,000.00" amounted to. McAleenan told Horning to forget the interest, and *Horning sent a check for $17,000.00, drawn to the order of McAleenan, to New York by Hoffman.*

Significant is the fact that Horning called McAleenan on both occasions *without the knowledge or direction of Mrs. Boyle,* and he sent the check for $17,000.00 to New York *without the knowledge or direction of Mrs. Boyle.*

The general rule is that a simple contract made by a duly authorized agent who fails to disclose his principal may be enforced against such principal when the other contracting party discovers the relationship of principal and agent. In fact, it may be said that for most purposes the contract of an agent who, with authority, deals in his own name without disclosing that of his principal, is the contract of the principal. *Ford* v. *Williams,* 21 How. 287, 16 L. Ed. 36, 37; *Harris* v. *McKay,* 138 Va. 448, 122 S. E. 137, 32 A. L. R. 156.

As to what will amount to giving exclusive credit to the agent so that an action against the undisclosed principal will not lie, it is clear that though a third person may have relied solely on the agent's credit before discovering the principal, *such third person may, upon discovering the principal, resort to the principal for the performance of the contract entered into by the agent on his behalf. Ford* v. *Williams, supra; Waddill* v. *Sebree,* 88 Va. 1012, 1015, 14 S. E. 849.

On the theory that Mr. Boyle was acting as the agent of the defendant for its benefit and in the furtherance of

its interests when she and Hoffman obtained the loan at McAleenans, the trial judge granted plaintiffs' Instruction No. 1, and we submit that the evidence and testimony fully sustains the ruling of the court and the verdict of the jury.

It is respectfully submitted that on the facts and the authorities discussed in this section of this brief, there was sufficient evidence for the case to go to the jury on the sixth and eighth causes of action and the Circuit Court of Appeals erred in holding and deciding that there was not.

6. George D. Horning, Incorporated, and Mrs. Boyle were joint adventurers and jointly borrowed the money from McAleenans, and the loan was made by the plaintiffs to the defendant and Mrs. Boyle for their joint benefit.

The Circuit Court of Appeals says in its opinion (R. 124):

> "We find no merit in the contention that defendant is liable on the theory of a joint enterprise on the part of defendant and Mrs. Boyle. The well-settled definition of a joint adventure expressly encompasses the element of profit seeking. This element is implicit in the very nature of commercial undertakings."

Some of the facts referred to in Section 5 of this brief obviously are applicable to this theory of the case.

We agree with the definition expressed by the Circuit Court of Appeals, but we disagree with their holding that there was no evidence that Mrs. Boyle and the defendant were engaged in a joint enterprise. Not only do we contend that they were engaged in a joint enterprise, but further, that they were joint borrowers and we submit that these facts are obvious from the evidence and the testimony.

In negotiating the loans and selling the jewelry in New York, they did so for their joint benefit and *both of them benefited* at the expense of the plaintiffs and the others who loaned the money and bought the jewelry.

Insofar as the defendant, George D. Horning, Incorporated, was concerned, it expected to receive interest on the loans made by it to Mrs. Boyle on the security of the jewelry pledged by her.

When Mrs. Boyle had involved the defendant for some $30,000.00, it became incumbent upon it to "unload"—necessarily so because the record conclusively shows that Mrs. Boyle owed the defendant interest, besides principal, when James B. Horning permitted Hoffman to go to New York with Mrs. Boyle.

Mrs. Boyle wanted more money on her jewelry. The defendant wanted his principal *and interest* and *they both got what they wanted.*

The Circuit Court of Appeals expresses its views as to the New York trip in its opinion (R. 125) as follows:

> "Much reliance is placed by plaintiffs on the fact that Hoffman accompanied Mrs. Boyle in her search for loans. But in the absence of a clear showing of fraud, since this was at Mrs. Boyle's expense, and on her request, Hoffman's trip to New York does not clearly help plaintiffs' case."

The learned Circuit Court of Appeals is mistaken in *its* interpretation of the facts.

The true fact of the matter is that Horning financed Mrs. Boyle's trip to New York (Hoffman, Tr. 237, 238, 239; Horning, Tr. 304, 305) and it was Hoffman who suggested that Mrs. Boyle go to New York (Tr. 206).

When Hoffman returned to Washington with the proceeds of their joint venture—$54,000.00—the money was deposited by the defendant in its account.

It is undisputed that on June 29, 1941, Mrs. Boyle had $30,000.00 in loans with the defendant (Hoffman, Tr. 238; R. 94), and the court's observation on this point (Tr. 323; R. 111) is pertinent:

> "The Court: And the net result is that when the thing came to an end, with the determination of the thing, when that came, it was about thirty thousand dollars."

This $30,000.00 in loans accumulated after Jack Blauweiss began giving jewelry to Mrs. Boyle on Memorandum on March 13, 1941, and she began to pawn "big stuff" with the defendant on March 14, 1941. Hence, the interest on the $30,000.00 at one per cent per month, the rate charged by the defendant, could not go back beyond March 14. This means that the interest thereon at the most would not exceed $1,200.00.

On June 30, July 1 and July 2, Mrs. Boyle was loaned $4,500.00 additional. Plaintiffs' Exhibit No. 11 shows that the interest on the $4,200.00 loaned by the defendant on the two pieces later pawned at McAleenan's was $42.00. Therefore, the interest on the other $300.00 must likewise have been 1 percent or $3.00.

Plane fare to New York, to and from, is $27.48. Hotel and meals for 2 days (July 8 and 9) could not have exceeded $20.00. Miscellaneous expenses might have reached $10.00. On this basis, Hoffman's total expenses incident to his trip totaled $57.48.

The insurance premium on jewelry such as the defendant placed on the three pieces sent to New York by Hoffman and pledged at McAleenans is $3.00 per $1,000.00 of value. The combination piece was valued at $22,000.00; the diamond necklace at $12,500.00; and the star sapphire ring at $7,500.00. These three items total $42,000.00. At $3.00

per thousand, the premium on the insurance would be $126.00.

What became of the money?

Hoffman and Horning both repeatedly testified that they were to receive nothing from Mrs. Boyle *because it was merely an accommodation to a good customer.* And they both insisted that the only thing the defendant did receive from Mrs. Boyle was the payment of her loans to it, *the interest thereon,* Hoffman's expenses to New York, and the cost of the insurance.

However, on July 11, the defendant and Mrs. Boyle had their settlement, and it must have been somewhat in this fashion:

Repayment of loans to June 29		$30,000.00
Interest from March 15 (4%)		1,200.00
Interest on $4,200.00 loaned on June 30, July 1 and 2		42.00
That loan		4,200.00
Loan on diamond pin—July 1		300.00
Interest on that loan		3.00
Hoffman's expenses:		
Plane Fare	$27.48	
Hotel and Meals	20.00	
Miscellaneous	10.00	
		57.48
Premium insurance on jewelry		126.00
Total Deductions by Defendant		$35,928.48

Horning and Hoffman both testified that they gave Mrs. Boyle $10,000.00.

$35,928.48 and $10,000.00 equals $45,928.48, or, roughly, $46,000.00. *Mrs. Boyle and Hoffman got $54,000.00 in New York.* $46,000.00 from $54,000.00 leaves $8,000.00.

What became of the remaining $8,000.00?

By their own admission, Mrs. Boyle did not receive it from either Horning or Hoffman, but it was deposited in the bank account of the defendant.

It is respectfully submitted that the transcript of the testimony clearly shows that the defendant and Mrs. Boyle had mutuality of interest in their joint adventure.

Mrs. Boyle was not only relieved of the pressure of the defendant on her for the repayment of its loans, but at the settlement she received $10,000.00. The defendant, acting through Hoffman, gave a bill of sale on the jewelry sold by Hoffman in New York *on Horning stationery* (Hoffman, Tr. 259). And when Mrs. Boyle found herself in trouble and under arrest on the night of July 22, *whom did she call upon for help? James B. Horning, of course* (Blauweiss, Tr. 131, 132; Horning, Tr. 291, 292, 326).

At page 263, Hoffman, on cross-examination, testified as follows:

> "By Mr. Jones:
>
> "Q. And you wanted to get from her (Mrs. Boyle) all of the facts, too?
>
> "A. No. I wanted to get the tickets from her.
>
> "Q. You wanted to know just how much trouble she was in, didn't you?
>
> "A. *I did want to know how much trouble she was in, of course, but I wanted the tickets.*" (Italics ours.)

And *twice* Mr. Hoffman volunteered that he took the $17,000.00 check to New York to pay off McAleenan the amount he had loaned because of Horning's "impulse." At page 260, this occurred:

> "By Mr. Jones:
>
> "Q. But you did go to New York on the twenty-first of July with a check for seventeen thousand in an attempt to obtain possession of the pawn tickets from Mrs. Boyle?

"A. That's right. *It was Mr. Horning's impulse at the moment.*" (Italics ours.)

And again, at pages 270, 271, when being interrogated by the trial judge, Hoffman said:

"By the Court:

"Q. I am not talking about when you went to get the seventeen thousand, but *why did you go up with a check for seventeen thousand to take the jewelry out of McAleenans if your firm had no concern with the transaction at all?*

"*Why did you go up there to take it up?*

"A. I will tell you why:

"*It just happens to be that Mr. Horning felt that he did not want to do anything that would disgrace the name of George D. Horning, Senior.*

"It seemed we had recommended customers before to other brokers in New York and they had made large loans we would not do ourselves, *and it was Mr. Horning's immediate impulse that he would rather take Mr. McAleenan out* and bring the goods back to Washington, as he thought Mrs. Boyle was all right." (Italics ours.)

Conclusive of the interest of the defendant in the negotiation of the McAleenan loan is the wording of its letter of July 8 which Hoffman presented to Mr. McAleenan. It read as follows:

"To Whom It May Concern:

"*This letter will introduce, Mr. Harold L. Hoffman who is in our employ and is authorized by* **US** *to place in pawn* for one of our customers a Mrs. M. Boyle of Washington, D. C., several pieces of diamond jewelry.

"GEORGE D. HORNING, INC.,
"By JAS. B. HORNING."

(Italics ours.)

That letter did not introduce Mrs. Boyle to McAleenan. By that letter, the defendant did not authorize Mrs. Boyle

to place any jewelry in pawn. *It was Hoffman who was introduced and Hoffman who was authorized by the defendant to place in pawn the jewelry.*

A joint adventure has been broadly defined as an enterprise undertaken by several persons jointly, and, more particularly, as an association of two or more persons to carry out a single business enterprise for profit. 30 Am. Jur. 677. See also *Chisholm* v. *Gilmer* (C. C. A. 4th), 81 F. (2d) 120 (affirmed in 299 U. S. 99, 81 L. Ed. 63, 57 S. Ct. 65), where the appellate court held that a "joint adventure" exists when two or more persons combine in a joint business enterprise for their mutual benefit with the understanding that they are to share in the profits or losses and that each of them is to have a voice in its management.

It must be conceded that the defendant could not have disposed of the jewelry without the consent of Mrs. Boyle, and, likewise, that Mrs. Boyle could not have pledged the jewelry in New York without the consent of the defendant, because part of the goods offered to McAleenan for pledge were then actually in pledge with the defendant, upon which goods the defendant had a lien, all of which was unknown to McAleenan. Furthermore, in consummation of their joint interests, *the defendant assumed to exercise the right of redemption of the goods by its own check without the knowledge of Mrs. Boyle, and would have done so had Hoffman been able to secure the pledge ticket,* for which purpose he went, on the defendant's instructions, to New York on July 21, 1941.

And, in discussing the rights, duties and liabilities of the parties to third persons, we find this statement in 30 Am. Jur. at page 699:

> "It has already been pointed out that the rights, duties, and liabilities of joint adventurers are governed, in general, by rules which are similar or analagous to those which govern the corresponding rights, duties,

and liabilities of partners, except as they are limited by the fact that the scope of a joint adventure is narrower than that of the ordinary partnership. Accordingly, as a general rule, *each of several joint adventurers has power to bind the others and to subject them to liability to third persons in matters which are strictly within the scope of the joint enterprise. Thus, a member of a joint adventure can bind his associates, whether disclosed or undisclosed, by such contracts as are reasonably necessary to carry on the venture. Even in jurisdictions where the power of a joint adventurer to bind his associates by contracts with third persons relating to the venture is considered to be less full than that of an ordinary commercial partner, it is recognized that one (700) joint adventurer may bind the others in matters respecting which he has been given express or apparent authority.*" (Italics ours.)

The text just quoted is fully sustained by the case of *State ex rel. Crane Co.* v. *Stokke, et als.*, 66 S. D. 207, 272, N. W. 811, 110 A. L. R. 761, 773.

On the Theory of a Joint Loan

Viewing the loan made by McAleenans as a joint borrowing by the defendant and Mrs. Boyle, one of the rules for determining whether a contract is joint, is whether the interest of the parties in the subject matter is joint, and it is an incident of every joint contract that all contractors are bound to its performance. Each and every one of the contractors stipulates that the contract shall be performed by all. They become sureties for one another for the performance of the thing contracted to be done. *Houston* v. *Bain*, 170 Va. 378, 391, 392, 196 S. E. 657, citing and quoting *Armstrong* v. *Henderson*, 99 Va. 234, 237, 37 S. E. 839, 840, where the court said:

"In a joint contract for the benefit of all, *each takes upon himself the liability to pay the whole debt*, consisting of the share which each co-contractor ought to

> pay as between themselves; and each, in effect, takes upon himself a liability for each to the amount of his share. *Each, therefore, may be considered as becoming liable for the share of each one of his co-contractors, at the request of such co-contractor.*" (Italics ours.)

See also, *Love* v. *Stidham*, 18 App. D. C. 306, 29 W. L. R. 439, 440, 441, 53 L. R. A. 397, 400, 401.

Plaintiffs' Instruction No. 4 was framed on the theory that Mrs. Boyle and the defendant, acting through Hoffman, were acting jointly and obtained the $17,000.00 from McAleenans for their mutual and joint benefit. The trial judge felt that there was sufficient evidence to sustain this theory of the plaintiffs' case and granted the instruction, and the jury returned a verdict for the plaintiffs.

It is respectfully submitted that the Circuit Court of Appeals erred in holding and deciding that there was insufficient evidence for the case to go to the jury on the theory that the defendant and Mrs. Boyle were engaged in a joint enterprise in obtaining the loans, and in further holding and deciding that there was insufficient evidence to take the case to the jury on the theory that the defendant and Mrs. Boyle jointly borrowed the money from the plaintiffs.

7. General assumpsit, as well as an action for fraud and deceit, will lie in a case circumstanced as this one.

Causes of action numbered sixth, eighth and ninth are the "common" or "money" counts in General Assumpsit.

"Money lent," "money paid" and "money had and received" are the "money" or "common" counts.

Sometimes a plaintiff may have more than one of such grounds of suit; more often he finds it prudent to state several modes of indebtedness, not being certain as to which his evidence will prove. It is judicious, and it is a quite general practice, to combine in one complaint several of these "money" counts, each alleging that the defendant was

indebted for some specified reason, and that he, in consideration of that fact, promised to pay what he owed, but did not do so.

The measure of damages in an action of General Assumpsit goes upon the benefit acquired by the defendant, and the plaintiff's *damage* upon the fictitious promise of the defendant to pay the debt due in virtue of the existing legal obligation, is the value of his goods or services, the sum of the money lent, paid or received by the defendant, with interest thereon in a proper case.

In *Miller* v. *Schloss*, 218 N. Y. 400, 113 N. E. 337 (quoting from *People* v. *Speir*, 78 N. Y. 144, and citing *Board of Commissioners* v. *Bloomington*, 253 Ill. 164, 97 N. E. 280), the court said:

> "A *quasi* or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. *In truth it is not a contract or a promise at all. It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it, and which ex aequo et bono belongs to another. Duty,* and not a promise or intention of the person sought to be charged, *defines it.* It is fictitiously deemed contractual to fit the cause of action to the contractual remedy." (Italics ours.)

On the same principle, where one has wrongfully acquired the goods of another, the duty to compensate the owner for his property is no less clear than in cases where the goods are obtained without a tort. Accordingly, in any case wherein as the result of a tort, such as deceit, or other fraud, the wrongdoer acquires property from its owner, the injured party may sue in General Assumpsit, alleging an indebtedness on account of money had and received to

his use, or (as is usual) employing this and other common counts. *Catts* v. *Phelan,* 2 How. 376, 11 L. Ed. 306; *Carland* v. *Western Union T. Co.,* 118 Mich. 369, 76 N. W. 762, 43 L. R. A. 280, 281, 282. And when the plaintiff adopts such mode of declaring, he is said to "waive" the tort and to sue upon the imputed promise of payment to be deduced from the defendant's moral obligation to pay for what he has wrongfully acquired. See also, *Second Nat. Bank* v. *M. Samuel & Sons,* 12 F. (2d) 963, 968, 53 A. L. R. 49 (cert. den. 273 U. S. 720, 71 L. Ed. 857, 47 S. Ct. 110); *Lawson* v. *Lawson,* 16 Gratt. 230, 232; *Trice* v. *Cochran,* 8 Gratt. 442, 450; *Piedmont Grocery Co.* v. *Hawkins,* 83 W. Va. 180, 98 S. E. 152, 4 A. L. R. 828, 830.

Fraud or deceit may be perpetrated, as was done in this case, by the intentional concealing of a material fact, or by the reckless representation of a fact without knowledge of its truth or falsity.

There was no question in the mind of the learned trial judge that the defendant, George D. Horning, Incorporated, had perpetrated a fraud upon the plaintiffs.

In the proceedings had in chambers (Tr. 340-344) the court said:

> "The Court: The element about that, about which there is question, is the knowledge on the part of Horning that the representation he was making was a false one.
>
> "Mr. Yeatman: Yes. We most certainly do not think that is well founded.
>
> "The Court: There is one modification, and that is a representation made so recklessly as to disregard the duty to ascertain whether or not the representation is false amounts to a false representation.
>
> "The Court: In other words: The court says when a man makes a representation, if he raises the question he had an honest belief in the truth of the representation, it must be a firm, honest, belief, based on some-

thing. *He can not make a reckless statement and say 'I believed it to be true.'*

"Mr. Yeatman: I understood that principle applied where malice is an element. One may have malice in fact, or——

"The Court (interposing): Here is what I have in mind. I looked it up this morning. The Court says:

> 'To sustain an action for fraud and deceit, based on false representations by defendant by which plaintiff was induced to purchase property, it must be shown (1) that the representation was false and (2) that the person making it knew it to be false; but if the fact was within his means of knowledge, and he had no knowledge of it, a jury is authorized to find that the statement was knowingly false.' (Hindman v. First National Bank, 112 Fed. 932.)

* * * * * * *

At pages 343-344 of the transcript, the trial judge further observed:

> "The Court: Of course, I do not know what the Jury —I do not think it is an abstract proposition of law as applied to this case when you consider the amount of jewelry which this woman suddenly appeared with and was pawning, the value of the money she was getting, the unusually expensive pieces which was entirely contrary to the defendant's previous experience with her. *I do not think that it could be said as a matter of law that that was any such state of affairs as did not put the defendant on some notice to make some inquiry.* I do not think you can say so.
>
> "The Jury may well say, to use the language of the case, that 'they shut their eyes from the facts and purposely abstained from enquiring into them.'
>
> "Mr. Yeatman: Of course, Mr. Horning testified he did enquire.
>
> "The Court: Yes.
>
> "That would be for the Jury to determine; whether or not he did make reasonable enquiry."
>
> (Italics ours.)

See also *Union Trust Corp.* v. *Fugate*, 172 Va. 82, 91, 200 S. E. 624.

It is, therefore, respectfully submitted that General Assumpsit, as well as an action for fraud and deceit, lies in a case circumstanced as this one.

8. The sixth cause of action is for money lent.

The action for money lent will lie whenever there has been a payment of money from plaintiff to defendant as a loan, but such payment must be actual. To sustain the action, *it is not necessary that there should be an express promise to repay, as the law will imply a contract where there is no express contract.*

It is not necessary that the money should have been delivered to defendant. *The action will lie equally where the money, although lent to defendant, was delivered to another at his request.* On this state of facts, however, the action for money paid will also lie. See "Money Lent," Secs. 2-4, 41 C. J. 2, 3.

The Circuit Court of Appeals say (R. 123, 124):

> "The sixth and seventh * causes of action seek recovery of money lent, and money paid to the defendant, respectively. These causes of action fail for the same reasons stated in reference to the fifth cause of action. Further, it was made clear to McAleenan, when the first check was drawn, that the money was being lent to Mrs. Boyle. Such evidence is plainly inconsistent with any promise by defendant to pay, implied in fact. There was, *we think*, no evidence on which the Court might instruct the jury with reference to an understanding on the part of both parties that defendant was the debtor." (Italics ours.)

But the trial judge thought differently. He said in his Memorandum (R. 10, 11):

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* Error. The *eighth* cause was for money paid.

"When, during these negotiations, Mr. McAleenan telephoned to Mr. Horning to verify Hoffman's credentials, he (McAleenan) told Horning that a Mr. Hoffman was then in his office and *HE* has presented a letter to me and stated that *HE* would require a loan of Twenty Thousand Dollars.' The words emphasized (by the writer) in the above indicate that McAleenan was proceeding on the belief that it was Hoffman whom he had to deal with, and *Mr. Horning in no way corrected this impression during the course of this conversation.* It is true that in the same conversation McAleenan recognized that *Mrs. Boyle was held out* as the owner of the jewelry, by inquiring as to her reliability.

"Mr. McAleenan states that although his appraiser fixed the loan value of the jewelry at $15,000.00 he (McAleenan) consented to loan $17,000.00 on it "due to the fact that Horning was connected with the transaction." *This also would indicate that McAleenan understood that Horning was a responsible party to the loan.*

"A significant fact is that when McAleenan had stated his willingness to make a loan of $17,000.00 on the jewelry and Hoffman had stated '*We* will take the Seventeen Thousand,' McAleenan directed his cashier to draw the check for that amount to the order of the defendant, Horning. *From this the natural presumption is that McAleenan understood Horning to be the borrower or, at least, that Horning was the beneficiary of the loan* * * * It is a fact also that the check for $17,000.00 was endorsed by Mrs. Boyle to Horning and deposited by the latter to its account in bank." (Italics ours.)

Under this theory of the case,—that the loan was one to Horning alone,—the court granted Plaintiff's Instruction No. 7.

It seems to us that the fact that Horning called McAleenan *twice and then sent a check for $17,000.00 to Mc-*

Aleenan by Hoffman on July 21, which is conceded by the defendant, *conclusively establishes the fact that Horning recognized that he was obligated to McAleenans for the loan. And so did the jury.*

And so did the District Judge. He said (R. 12, 13):

> "Another significant feature of evidence is that which relates to happenings after it came to the attention of the defendant that there was question of Mrs. Boyle's title to the jewelry pawned. On July 18th, at which time McAleenan had no knowledge of anything wrong, Mr. Horning telephoned Mr. McAleenan asking him to put a "stop" on the jewelry, which the latter agreed to do. *If the transaction had been with Mrs. Boyle alone and solely for her benefit, as defendant now contends, there would have been no authority in defendant to put a "stop" on the jewelry and no reason for it to do so. That defendant of its own volition exercised this authority and that the plaintiff yielded to it without question implies a recognition by both parties of defendant's responsibilities.* And on July 21st Horning again telephoned McAleenan inquiring as to the interest due on the loan to that time and stating that he (Horning) wanted to send a check to pay the loan and interest. Both of these telephone conversations were initiated by Horning and it appears that when McAleenan expressed his regret that Horning was 'in trouble' or 'in a jam' Horning said nothing to indicate that he felt himself free of liability or that anyone else was liable on the loan. It is admitted that Horning thereafter sent a check to New York for the purpose of paying the loan but that McAleenan would not surrender the jewelry without the pawn ticket which had been given to Mrs. Boyle and which Horning was unable to produce.
>
> "The above excerpts from the testimony and the inferences that might be drawn therefrom have been related here in some detail, since they furnish the basis for plaintiff's reliance on a contractual relation-

> ship upon which the defendant is liable. Standing alone I think there is little doubt that they furnish such a basis * * *." (Italics ours.)

We respectfully submit that there was sufficient and substantial evidence to sustain the verdict of the jury and the judgment of the court under this cause of action.

9. The eighth cause of action is for money paid.

In 41 C. J. 12, we find this statement of the rule on the right of recovery under this one of the "money" counts:

> "One who has paid money for the use or benefit of another to a third party may recover from that other the money so paid, if such payment was made at that other's express request, or *if he subsequently ratified it, or if, in the absence of such request or ratification, it was made under circumstances from which the law will imply an obligation to repay, even though there was no express promise to repay, the law implying such a promise.*" (Italics ours.)

The action is founded on equitable principles, no privity of contract between the parties being required, except that resulting from circumstances showing an equitable obligation. *Commercial Nat. Bank* v. *Sloman,* 194 N. Y. 506, 87 N. E. 811.

We respectfully submit that the Circuit Court of Appeals was in error in deciding and holding that there was insufficient evidence to take the case to the jury under this cause of action and was further in error in substituting *its* finding of facts for those found by the jury at the trial.

The record in the case clearly shows that the defendant requested McAleenans to make the loan to Mrs. Boyle without disclosing to the plaintiffs that the loan was for its use and benefit. Furthermore, it cannot be denied that the defendant subsequently ratified the loan by accepting the proceeds thereof.

The money paid by the plaintiffs was paid under circumstances from which the law will imply an obligation on the part of the defendant to repay the money to the plaintiffs.

Plaintiffs' Instruction No. 7 is likewise applicable to this cause of action.

The case having been submitted by the trial judge to the jury on this cause of action, and the jury having returned a general verdict in favor of the plaintiffs, the verdict of the jury and the judgment entered thereon by the District Judge should be sustained and the judgment of the Circuit Court of Appeals reversed.

10. The ninth cause of action is for money received.

While no instruction was granted by the District Judge on the ninth cause of action, because one could not be framed without directing a verdict for the plaintiffs, nevertheless, the District Judge submitted the case to the jury on the ninth cause of action, as well as the fifth, sixth and eighth causes of action.

An action for money had and received may be maintained whenever one has money in his hands belonging to another, which, in equity and good conscience, he ought to pay over to that other. The question, under this cause of action, is, to which party does the money, in equity, justice, and law, belong, and all that the plaintiffs need show is that the defendant holds money which, in equity and good conscience, belongs to them, and *any* evidence is admissible to prove or disprove plaintiffs' cause of action. While it is an action ex contractu, no express promise need be proved. And even though an action for tort might lie against the defendants, the plaintiff may elect which remedy he will pursue.

In *Lawson* v. *Lawson,* 16 Gratt. 230, 232, it is said:

> "But it is said that if the plaintiff be entitled to recover, he cannot do so in this action, but should have

declared on the special case, or in trover and conversion.

"I do not think the plaintiff was bound to declare specially. The action of *indebitatus assumpsit* for money had and received will lie whenever one has the money of another which he has no right to retain, but which *ex aequo et bono,* he should pay over to that other. This action has of late years been greatly extended, because founded on principles of justice; and *it now embraces all cases in which the plaintiff has equity and conscience on his side, and the defendant is bound by ties of natural justice and equity to refund the money.* In such a case, *no express promise need be proved, because from such relation between the parties the law will imply a debt and give this action founded on the equity of the plaintiff's case,* as it were upon a contract, *quasi ex contractu* as the Roman law expresses it, and upon this debt founds the requisite undertaking to pay. *Moses* v. *Macfarlan,* 2 Burr. R. 1005, 1008, 1012; Per Butler J., *Straton* v. *Rastall,* 2 T. R. 366, 370." (Italics ours.)

So, where a person obtains money of another by compulsion, extortion, oppression, or fraud, an action for money had and received will lie to recover it, and one of the frequently employed remedies at law for the redress of fraud is assumpsit. *McCall* v. *Superior Court,* 1 Cal. (2d) 527, 36 P. (2d) 642, 95 A. L. R. 1019; *Philpott* v. *Superior Court,* 1 Cal. (2d) 512, 36 P. (2d) 635, 95 A. L. R. 990; *Trice* v. *Cochran,* 8 Gratt. 442, 450 (stated in terms of action for breach of warranty). See also, *Second Nat. Bank* v. *M. Samuel & Sons, Inc.,* 12 F. (2d) 963, 968.

The *Philpott* case is well considered on the theory of an action for money had and received. Therein (citing Clark on Contracts, 4th Ed.), it is said (95 A. L. R. 995):

"A frequent illustration of a quasi-contractual obligation of this kind arises where a person obtains another's money by wrongful or fraudulent means.

> Where one person has wrongfully taken another's money, or has taken his property and converted it into money, the latter has a right of action ex delicto for the wrong done to him, as by an action of trespass or trover, or by an action on the case for fraud. He is not always restricted, however, to an action ex delicto for the specific wrong, but may in general waive the tort, and sue in assumpsit for the money as for money received for his use * * * *Where a person steals another's money or property, or obtains it by false pretenses,* the fact that a *crime* has been committed will not prevent a civil action by the person injured. *He may sue the thief in tort, or he may elect to sue in assumpsit as for money received for his use. The same is true in any case in which one person,* by means of trespass, fraud, or other tortious means, detains another's money." (Italics ours.)

The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. In this class of cases the notion of a contract is purely fictitious. There are none of the elements of a contract that are necessarily present. The intention of the parties in such case is entirely disregarded. As has been well said, in the case of contracts the agreement defines the duty, while in quasi-contracts, the duty defines the contract. *Highway Commissioners* v. *Bloomington,* 253 Ill. 164, 97 N. E. 280; *Donovan* v. *Purtell,* 216 Ill. 269, 75 N. E. 334, 1 L. R. A. (N. S.) 176, 183, 184; *Armour & Co.* v. *Whitney & Kemmerer,* 164 Va. 12, 21, 22, 178 S. E. 889, 98 A. L. R. 596; *Norfolk* v. *Norfolk County,* 120 Va. 356, 91 S. E. 820.

In the *Armour* case, it is said:

> "The action of assumpsit is a liberal and equitable one, and is applicable to almost every case where money has been received which in equity and good conscience ought to be refunded. *An express promise is not neces-*

sary to sustain it, but it may be maintained wherever anything is received or done from the circumstances of which the law implies a promise of compensation." (Italics ours.)

See also, *Buena Vista Co.* v. *McCandlish,* 92 Va. 297, 303, 23 S. E. 781; *Harr* v. *Roome,* 28 App. D. C. 214, 34 W. L. R. 709, 710. In the latter case, it is said:

"*The count for money had and received may in general be proved by any legal evidence showing that the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff,* and this count may be supported by evidence in regard to things treated as money; a promissory note, for instance." (Italics ours.)

And, while speaking of fraud, it has been said that fraud assumes so many different degrees and forms that *courts* are compelled to content themselves with comparatively few general rules for its discovery and defeat, and *allow the facts and circumstances peculiar to each case to bear heavily on the conscience and judgment of the court or jury in determining its presence or absence. Meldrum* v. *Meldrum,* 15 Colo. 478, 24 P. 1083, 11 L. R. A. 65, 70; *Leach* v. *Central Trust Co.,* 203 Iowa 1060, 213 N. W. 777, 57 A. L. R.. 1165, 1167; *Hale* v. *Hale,* 62 W. Va. 609, 59 S. E. 1056, 14 L. R. A. (N. S.) 221, 227.

In the *Hale* case, the court said:

"* * * Fraud assumes so many different hues and forms that *courts are compelled* to content themselves with comparatively a few general rules for its discovery and defeat, and *allow the facts and circumstances peculiar to each case to bear heavily on the conscience and judgment of the court or jury in determining its presence or absence* * * *" (Italics ours).

And in the *Leach* case, we find this statement:

> "* * * Fraud may arise from facts and circumstances and may be presumed from circumstances and conditions of the parties contracting. Kerr, Fraud & Mistake, 5th Ed. p. 1, says that fraud is so various in form and color that it is difficult, if not impossible, to confine it within the limits of any precise definition; *that the fertility of man's invention in devising new schemes of fraud is so great that the courts have always declined to define it, * * * reserving to themselves the liberty to deal with it under whatever form it may present itself.* See *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U. S. 383, 32 L. Ed. 439, 9 S. Ct. 101, where it was held that acts which the law declares to be fraudulently, *independent of the motive*, are said to be constructively fraudulent, and may consist of omissions or commissions in violation of some legal or equitable duty, trust, or *confidence* whereby another is injured" (Italics ours).

In view of the authorities just cited and quoted, all of the facts and circumstances surrounding the transaction were admissible, and after due consideration by the trial judge and the jury, those facts and circumstances were resolved in favor of the plaintiffs. The only premise upon which the jury could have found under this cause of action was that the defendant had money in its possession belonging to the plaintiffs, which, *ex aequo et bono*, in equity and good conscience, belonged to the plaintiffs.

It is respectfully submitted that under all of the facts and circumstances in this case, the verdict of the jury under this cause of action was fully sustained by the evidence and the exhibits, and that the confirmation of that verdict by the trial court was proper.

11. The action of the Circuit Court of Appeals in reversing the judgment of the District Court and remanding the cause to that Court with direction that final judgment be entered for the defendant deprives the plaintiffs of their Constitutional right to a trial by jury.

The learned Circuit Court of Appeals, in their opinion, clearly indicated that there were disputed facts in the case, when they said (R. 118):

> "* * * Hoffman told McAleenan that Mrs. Boyle was the owner of the jewelry, was a very prominent woman in Washington and had done business with defendant for many years. (Hoffman denied that he made any statement with reference to ownership). * * *"

They again said (R. 118):

> "* * * * A check was drawn to the order of Horning & Company but Hoffman requested that the check be drawn to Mrs. Boyle since the loan was being made to her. McAleenan testified that Hoffman turned to Mrs. Boyle and said: 'It's six of one and half a dozen of the other; you can endorse the check over to us.' (Hoffman vigorously denied making this statement.) * * *"

We respectfully submit that it was for the jury to say whom they believed—McAleenan or Hoffman—and it is obvious from their verdict that they chose to believe McAleenan.

On the other hand, it is obvious that the Circuit Court of Appeals chose to believe Hoffman, and in so doing, they invaded the province of the jury, and throughout their opinion, substituted their findings of the facts for the facts found by the jury.

The Seventh Amendment to the Constitution provides:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by

> jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

This is a prohibition to the courts of the United States to re-examine in any other manner facts tried by a jury. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court for some error of law which intervened in the proceedings. *Parsons* v. *Bedford*, 3 Pet. 433, 447, 7 L. Ed. 732; *Crim* v. *Handley*, 94 U. S. 652, 24 L. Ed. 216; *Capital Traction Co.* v. *Hof*, 174 U. S. 1; 43 L. Ed. 873; *Slocum* v. *New York L. Ins. Co.*, 228 U. S. 364, 57 L. Ed. 879.

It is fundamental that in a case being tried by a jury the court should not undertake to pass on and decide issues of fact. *Slocum* v. *New York L. Ins. Co., supra.*

The jury's function has as definite sanction as that of the court. *Schaefer* v. *United States*, 251 U. S. 466, 64 L. Ed. 360.

The controlling functions of a jury are to pronounce on the credibility of witnesses; to determine disputed facts; to draw conclusions from doubtful and contradictory premises; and to admeasure damages where the law has afforded no standard. It is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence. *Slocum* v. *New York L. Ins. Co., supra; Curley* v. *Automobile Finance Co.*, 343 Pa. 280, 23 Atl. (2d) 48, 139 A. L. R. 1082. See also *Rogers* v. *United States*, 141 U. S. 548, 35 L. Ed. 853.

Where different conclusions may reasonably be drawn by different minds from the same evidence, the question is

ordinarily one for the jury. *Interstate Power Co.* v. *Thomas*, 51 Fed. (2d) 964, 84 A. L. R. 681.

In jury trial cases it is the sole peculiar province and function of the jury to determine or decide disputed claims and questions of fact arising in the case before it, and the law does not countenance any invasion or usurpation by the court of this province and function of the jury to weigh the evidence and find the facts. *Kauffman* v. *Maier*, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; *Cincinnati Street R. Co.* v. *Snell*, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276.

The jury have a right to draw from proved circumstances such conclusions as are natural and reasonable. *Spies* v. *People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, (writ of error dismissed in 123 U. S. 131, 31 L. Ed. 80); *State* v. *Sotah*, 100 W. Va. 652, 131 S. E. 706, 46 A. L. R. 1523.

Of interest is the case of *Nolan* v. *Werth*, 79 U. S. App. D. C. 33, 124 Fed. (2d) 9, 72 W. L. R. 636, 637, decided by the United States Court of Appeals for the District of Columbia on April 10, 1944.

This was an appeal from the Municipal Court of Appeals for the District of Columbia.

Appellees sued appellant in the Municipal Court of the District of Columbia to recover a balance due under a rent assignment contract. The issue was whether appellant, or a corporation of which he was an officer, was liable. Appellees insisted that the contract bound the appellant personally. A jury was waived, the case submitted to the court and a general verdict found for the defendant (appellant), and judgment was entered accordingly.

On appeal to the Municipal Court of Appeals, the judgment was reversed on the ground that all the evidence taken together made a clear case of personal liability on the part of appellant. *Werth* v. *Nolan*, 32 Atl. (2d) 386, 71 W. L. R. 138.

In reversing and remanding the case for action in accordance with its opinion, Mr. Chief Justice Groner, speaking for the United States Court of Appeals for the District of Columbia, said:

> "• • • In short, the evidence was such that either one of two different conclusions might reasonably have been drawn from it, and in such a case we have said time and again the decision is for the trial court; that its judgment must stand and that the appellate court may not reweigh the evidence or override the findings, except where it clearly appears they are manifestly wrong. In the case we have here it is enough to say, as the Supreme Court said in Lawson v. U. S. Mining Co., 207 U. S. 1-12, that if the testimony is not sufficient to show that the trial court's decision is necessarily right, it wholly fails to show that it is necessarily wrong, *from which it follows that the appellate court was incorrect in substituting its own findings.* Hearst Radio v. Good et al., 67 App. D. C. 250, 91 F. (2d) 555, 65 Wash. Law Rep. 717; U. S. v. Ingalls, 72 App. D. C. 383, 114 F. (2d) 839, 68 Wash. Law Rep. 1090; Lawson v. U. C. M. Co. (supra); McCaughn v. Real Estate Co., 297 U. S. 606" (Italics ours).

But we feel that conclusive upon the question is the decision of this Court in *Tenant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 88 L. Ed. 520, decided January 17, 1944 (rehearing denied February 14, 1944), on a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment reversing a judgment of the District Court of the United States for the Southern District of Illinois, Northern Division, in favor of the plaintiff in an action under the Federal Employers' Liability Act.

At page 525 (L. Ed.) this Court speaking through Mr. Justice Murphy, said:

"In holding that there was no evidence upon which to base the jury's inference as to causation, *the court below emphasized other inferences which are suggested by the conflicting evidence* * * *" (Italics ours).

This Court then continued:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. *It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.* Washington & G. R. Co. v. McDade, 135 U. S. 554, 571, 572, 34 L. ed. 235, 241, 242, 10 S. Ct. 1044; Tiller v. Atlantic Coast Line R. Co. supra (318 U. S. 68, 87 L. ed. 618, 63 S. Ct. 444, 143 A. L. R. 967); Bailey v. Central Vermont R. Co. 319 U. S. 350, 353, 354, 87 L. Ed. 1444, 1447, 1448, 63 S. Ct. 1062. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions *or because judges feel that other results are more reasonable.*

"Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. *Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial.* No reason is apparent why we should abdicate our duty to protect

and guard that right in this case. We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion" (Italics ours).

It is respectfully submitted that the Circuit Court of Appeals, in substituting its findings of facts for the facts found by the Jury, invaded the province of the Jury, and deprived the plaintiffs of their Constitutional right to a trial by jury.

Conclusion

Petitioners therefore pray that this Court issue its writ of certiorari herein, and that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, filed on the 12th day of May, 1945, which became final by the denial of petitioners' petition for a rehearing on June 12, 1945, be reversed.

Respectfully submitted,

JOHN PAUL JONES,
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Of Counsel:
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(22)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 423.

ARTHUR McALEENAN, HENRY J. McALEENAN, H. ALVIN McALEENAN, ALVINA V. McALEENAN, KATHERINE McALEENAN FAGAN, MARGERY McALEENAN O'SULLIVAN, KENNETH K. McALEENAN and THERESA R. HAGGERTY, Co-partners, Doing Business Under the Firm Name and Style of "McAleenans," *Petitioners,*

v.

GEORGE D. HORNING, Incorporated, a Corporation, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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v.

GEORGE D. HORNING, Incorporated, a Corporation, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This action was instituted by petitioners against respondent to recover $17,000.00 loaned by petitioners on July 8, 1941. In their amended complaint, petitioners stated their cause of action in nine different forms. At the completion of all of the evidence petitioners had withdrawn five causes of action and relied on the remaining four. As stated by the District Judge—

> "These remaining causes of action, on which the case was submitted to the jury, each stated in somewhat

varying form a contractual relationship between the plaintiffs and the defendant and the court gave what it considered pertinent instructions on each. One of these was upon the theory that Mrs. Boyle in negotiating the loan from plaintiffs was acting as agent of the defendant; another was based on the theory that Mrs. Boyle and the defendant borrowed the money jointly; and the third upon the proposition that the loan had been made for the benefit of the defendant with the understanding by both parties that defendant was obligated for its repayment." (R. pp. 7, 8)

All charges of fraud and deceit were withdrawn.

As pointed out by the opinion of the Circuit Court of Appeals, the loan was made to Mrs. Boyle and there was no evidence of any contractual relation between petitioners and respondent. The court also stated that the clear and uncontradicted testimony of McAleenan, the petitioner who made the loan for his pawnbroking establishment, is patently inconsistent with any such theory. To quote:

"* * * No other tenable conclusion, we think, can be reached than that McAleenan well understood that the loan was being made to Mrs. Boyle and neither to defendant singly nor defendant jointly with Mrs. Boyle. In his testimony relating to his telephone conversation with Horning, he stated: 'I thanked him for his courtesy in *sending the business* and hung up.' (Italics ours) Further, he (fol. 127) testified: 'Mr. Hoffman said that Mrs. Boyle (not defendant) might like to retrieve the articles individually and if I would break it down for her.'

Nor do we view it as unimportant that when Kelly, plaintiffs' employee, asked if the pawn ticket should be made out in the name of Horning, McAleenan replied: 'No. Make it out in the name of Mrs. Boyle.' In this connection it may be noted that it was Mrs. Boyle (not Hoffman for defendant) who signed the stub, thereby agreeing to be bound by all the conditions thereon.

Much stress is placed by plaintiffs on the letter of introduction presented to McAleenan by Hoffman, as supporting the theory that the loan was being made to

defendant or to defendant and Mrs. Boyle jointly. While we agree that this letter might well be termed a classical example of ineptness, we think the following testimony of McAleenan clearly shows that there was no misunderstanding on his part.

Q. Did not the letter itself say: 'He is authorized to place in pawn for one of our customers?' You knew from that letter that it was Mrs. Boyle who was seeking a loan, did you?

A. Surely.

Q. And not Horning?

A. I imagine that was self-evident.

Q. And you so understood it at the time?

A. That is right." (R. pp. 122, 123)

It is patent that the District Court should not have submitted the case to the jury on the causes of action retained by petitioners. Appeal was prosecuted to the Circuit Court of Appeals because the District Court refused to grant respondent's motion and enter a judgment for respondent notwithstanding the verdict.

No sound reason is assigned in the petition to support the request of petitioners that this court exercise its judicial discretion in favor of granting the writ. An alleged constitutional question is suggested and inapplicable cases cited but not reviewed. (P. 55 et seq.) Most of the petition consists of an argument on the merits of petitioners' contentions in the courts below as though the petition had been granted and the case here for reargument. It is interlarded with exaggerations and catch phrases of counsel designed to lead the court to believe that the respondent had been guilty of some fraudulent act, although petitioners did not have sufficient confidence in this suggestion, as already indicated, to stand on their causes of action in fraud and deceit and frame issues upon the same to be submitted to the jury.

RIGHT TO THE WRIT OF CERTIORARI.

The only reasons advanced in the petition for granting the writ are, (1), petitioners were denied the right to have the judgment of a jury on the questions of fact presented at the trial; (2), the appellate court invaded the province of the jury; and (3), it did not have authority to reverse the judgment below and remand the case with direction that the final judgment be entered for the respondent. (Pet. 5)

The "Reasons for Granting Writ" and "Questions Presented", (p. 5) on their face disclose that petitioners are not entitled to the review sought within the meaning of Section 240(a) of the Judicial Code, as amended, (28 U.S.C.A., sec. 347(a)), as interpreted by the decisions of this court, and its Rule 38(2)(5).

The first two reasons challenge the right of an appellate court to review the record and determine whether or not there is sufficient evidence to warrant the submission of a case to the jury. This proposition is so untenable that it is not worthy of reply. The third reason challenges the right of the court in reversing this case, to remand with direction to enter a judgment for the respondent. There is no merit in this contention.

At the close of petitioners' case respondent moved for a directed verdict. At the close of all of the evidence the motion was renewed. The court submitted the case to the jury after taking these motions under consideration and reserving action thereon. (R. p. 19) The jury returned a verdict in favor of petitioners. Respondent then moved the court, within the time prescribed, to enter a judgment in accordance with its motion, or in the alternative that judgment for plaintiff be set aside and a new trial granted. This motion was denied.

The entire procedure was strictly in accordance with the provisions of Federal Civil Procedure Rule 50(b).

The Circuit Court of Appeals in disposing of some of the contentions made in the petition stated its legal duty

to remand with direction to enter judgment for respondent in the following quote:

> "We are not impressed with the contention of plaintiffs' counsel that the jury's verdict should be sustained because it was a general one, since we find no sufficient evidence to support any of the causes of action upon which plaintiffs rely. Nor do we find merit here in the argument that since the verdict was approved by the trial judge it should not be disturbed on appeal. It is clear that should it be found on appeal that the evidence was insufficient, the appellate court may reverse with a direction to enter judgment notwithstanding the verdict. Baltimore & Carolina Line v. Redman, 295 U. S. 654; Carpenter v. Durell, 90 F. (2d) 57." (R. p. 122)

The application for the writ is answered by the case of *Brunet* v. *S. S. Kresge Co.*, 115 F. (2d) 713, C. C. A. 7th Cir., decided November 1, 1940. In that case a judgment was rendered against the defendant for $5,000.00 in an action for damages for injuries claimed to have been sustained by the plaintiff. Defendant moved for a directed verdict at the close of the plaintiff's evidence, and again at the close of all of the evidence, which motions were overruled. The Circuit Court held, after a careful reading of the record, it was convinced that the record did not disclose negligence on the part of the defendant and freedom from negligence on the part of the plaintiff so as to justify the judgment in favor of the plaintiff, and that defendant's motion for a directed verdict should have been sustained. After reviewing the law, the court directed that the judgment be reversed and the cause remanded with direction to dismiss on the merits. On motion for a rehearing plaintiff raised the constitutional question now made by petitioners, namely, that she was denied the right of trial by jury guaranteed by the Seventh Amendment, and cited *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879, and *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389 57 S. Ct. 809, 81 L. ed. 1177. The court reviewed the Slocum

case and the later decision of this court in *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. ed. 1636, and then stated:

> "Here, motion was duly made for the directed verdict, which was taken under advisement and later denied. Without the new Rule, this would undoubtedly bring the case within the purview of the Slocum case, and we would be required to remand for new trial. However, within ten days after reception of the verdict, appellant filed two motions, one to set aside the verdict and for new trial, and the other to set aside the verdict and enter judgment notwithstanding the verdict. Both were duly denied, and judgment entered on the verdict. We think this action of the defendant preserved its rights under the Rule, so that it is now entitled to direction of a judgment without new trial. When the Supreme Court decided the Redman case, it ordered that the judgment of the Court of Appeals be modified by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial. It had previously stated that this judgment of dismissal would be the equivalent of a judgment for the defendant on a verdict directed in its favor. It appears that the Rule seeks to extend and crystallize the practice prescribed in the Redman case, hence our directions for dismissal on the merits." (p. 716)

We cite and quote from that case because certiorari was denied by this court, (61 S. Ct. 1102, 313 U. S. 577, 85 L. ed. 1535).

See also—

Waggaman v. *General Finance Co.*, 116 F. (2d) 254, C. C. A. 3rd Cir.

Williams v. *New Jersey-New York Trans. Co.*, 113 F. (2d) 649, C. C. A. 2nd Cir.

Petitioners seek to inject a constitutional question into this case which does not exist in an effort to induce this court to review the judgment of the Circuit Court of Appeals on a ruling which is not one of general importance or

public interest nor of an exceptional or extraordinary character.

In *Del Vecchio* v. *Bowers*, 296 U. S. 280, 80 L. ed. 229, 232, certiorari was granted in a case decided by the Court of Appeals of the District of Columbia because it involved the Longshoremen's and Harbor Workers' Compensation Act, which was national in scope. In stating the reasons for granting the writ in that case, this court clearly excluded from the operation of Rule 38 cases of this kind in the following language:

> "In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement *constitutes a precedent of general application.* We therefore granted the writ because of the important question as to the effect of Sec. 20(d)." (Italics supplied)

In *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 82 L. ed. 1273, this court refused to grant a writ of certiorari merely to review the evidence or inferences to be drawn from it. That is precisely what petitioners pray in this case.

In the course of its opinion, the court said:

> "There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U. S. 508, 69 L. ed. 413, 44 S. Ct. 164; United States v. Johnston,

268 U. S. 220, 227, 69 L. ed. 925, 926, 45 S. Ct. 496." (p. 1275)

Rule 38 was in effect at that time.

Petitioners rely upon *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 88 L. ed. 322. That case involved legislation national in scope, namely, the Federal Employers' Liability Act, and, as stated by the court, certiorari was granted "because of important problems as to petitioner's right to a jury determination of the issue of causation." (p. 30)

We do not attempt to reply to the lengthy brief and argument of petitioners because, as stated in *General Talking Pictures* v. *Western Elec. Co., supra*, granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.

Petitioners seek to prejudice the legal position of respondent by arguing at much length (p. 34 et seq.) that respondent may have received $8,000.00 out of the transactions of Mrs. Boyle over and above the amounts owing to it by Mrs. Boyle when a settlement was made. This same argument was made in the Circuit Court of Appeals. After petitioners at their solicitation were permitted to file a supplemental brief, respondent filed a reply brief referring to respondent's pledge book which was produced in court and offered in evidence by *petitioners*, and was thereafter filed in the clerk's office of the Circuit Court of Appeals, which showed that when a settlement was made with Mrs. Boyle upon her return from New York, she redeemed loans made to her by respondent which, together with interest, amounted to $43,236.10. Adding to that figure the amount received by Mrs. Boyle in cash, namely, $10,200.00, and a payment of a loan made by her daughter of $100.00, it was shown that approximately $53,536.10 was accounted for. The remaining $463.90 was used for expenses of Mrs. Boyle and Hoffman in connection with the trips to New York, insurance and other charges.

There was submitted to the Circuit Court of Appeals photostats of the pages of the pledge book showing an itemization of these loans, their numbers, the dates they were made and that all of them were redeemed on July 11, 1941, by Mrs. Boyle when the settlement was made. The entire argument of petitioners is a tenuous one not based on the actual facts demonstrably shown by the records and solely on one or two loose statements injected by counsel for petitioners in question propounded to the witnesses. We believe it is not necessary in this opposition to further analyze the record on this point.

CONCLUSION.

It is respectfully submitted that the alleged error of the Circuit Court of Appeals, 4th Circuit, is not such as to call for review and determination by this Honorable Court.

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